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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 235

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM C. WELDEN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The Memorandum and Order of the district court (R. 38–40) is reported at 215 F. Supp. 656.

JURISDICTION

The indictment was filed under Section 1 of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. 1) and under the Conspiracy Act (18 U.S.C. 371). The judgment of acquittal of appellee Welden (R. 41) was entered on March 27, 1963, upon the district court's grant of appellee's motion to dismiss the indictment on the ground that appellee had obtained immunity from prosecution by virtue of testimony he gave before a congressional committee. Notice

of appeal was filed on April 26, 1963 (R. 45). Probable jurisdiction was noted on October 14, 1963 (R. 48; 375 U.S. 809).

The jurisdiction of this Court to review by direct appeal the judgment of the district court is conferred by the Criminal Appeals Act (18 U.S.C. 3731), since that judgment is one "sustaining a motion in bar, when the defendant has not been put in jeopardy." *United States* v. *Monia*, 317 U.S. 424; *United States* v. *Hoffman*, 335 U.S. 77.

QUESTION PRESENTED

Whether a person who testifies before a congressional subcommittee is testifying in a "proceeding, suit, or prosecution under" the antitrust laws and thereby obtains immunity under the Act of February 25, 1903, from prosecution with respect to any matter concerning which he testifies.

STATUTE INVOLVED

The Act of February 25, 1903, 32 Stat. 854, 904, 15 U.S.C. 32, provides in part:

> • • • no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts [the Interstate Commerce Act, the Sherman Act, and the antitrust provisions of the Wilson Tariff Act[1]]: *Provided further*, That

[1] Sections 73, 74, 75, and 76 of the Act of August 27, 1894, 28 Stat. 509, 570 (15 U.S.C. 8–11).

no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

STATEMENT

Appellee is a member of the senior board of executives of H. P. Hood & Sons, Inc., and is also head of the following three departments of that company: government relations, economic research, and purchasing. On September 6, 1962, an indictment was returned against him, four other individuals and three corporations, including H. P. Hood & Sons, Inc. (R. 14–27).[2] Count One charged the defendants with violating Section 1 of the Sherman Act by conspiring, among other things, to fix prices in the sale of milk in the Greater Boston Area; to allocate among themselves the business of selling milk to designated federal, state, and municipal institutions in Maine, New Hampshire, and Massachusetts; and to engage in collusive bidding for contract awards from these institutions. Count Two charged all three corporations and three of the individuals, including appellee, with a conspiracy to defraud and injure the United States in violation of 18 U.S.C. 371.

Appellee moved to dismiss the indictment on a number of grounds (R. 28–30).[3] One ground was that

[2] The indictment of September 6, 1962, superseded one returned on April 24, 1962, against the same defendants. The April 24th indictment was dismissed by the government, with the consent of the court, on December 5, 1962 (R. 34).

[3] Appellee's motion was addressed to the April 24th indictment, but by stipulation filed on September 25, 1962, the motion was made applicable to the September 6th indictment (R. 35). See *supra*, no. 2.

prosecution was prohibited under the immunity provision of the Act of February 25, 1903 (15 U.S.C. 32) because in February 1960 he had given testimony before a subcommittee of the House Select Committee on Small Business concerning transactions, matters, and things covered by the indictment (R. 30). It is unnecessary to review appellee's testimony before the subcommittee, for no contention is made by the government here, and none was made below, that the testimony did not pertain to matters charged in the indictment.[4]

The district court filed a Memorandum and Order (R. 38–40), upholding appellee's reliance on 15 U.S.C. 32 and rejecting the government's contention that testimony before a congressional committee is not given in a "proceeding * * * under [the antitrust laws]" within the meaning of the immunity provision of the 1903 statute. To hold otherwise, it reasoned, "would fly in the face of traditional American notions of fair play * * * and subject a defendant to stand trial for conduct about which he has been compelled to testify by the subpoena power of a Congressional

[4] Appellee's testimony is set forth in Hearings before the Special Subcommittee of the Select Committee on Small Business, House of Representatives, 86th Cong., 2d Sess., Part IV, pp. 665–700. The hearings, which concerned practices in the distribution of dairy products, are included in the record certified to this Court. The Select Committee had been authorized by the House to study and investigate the problems of all types of small business (H. Res. 51, 86th Cong., 1st Sess., 105 Cong. Rec. 1785) and its chairman appointed the Special Subcommittee to study the problems of small business in the dairy industry (H. Rep. 714, 86th Cong., 1st Sess.).

Subcommittee" (R. 40). The Court concluded that the immunity provision bars appellee's prosecution and dismissed the indictment as to him (R. 41).[5]

ARGUMENT

THE ACT OF FEBRUARY 25, 1903, DOES NOT CONFER IMMUNITY FOR TESTIMONY GIVEN BEFORE A CONGRESSIONAL COMMITTEE

INTRODUCTION AND SUMMARY

The power of Congress to compel testimony is, of course, limited by the Fifth Amendment privilege against self-incrimination which permits a refusal to testify whenever the answer might tend to subject the witness to criminal responsibility. *Quinn* v. *United States,* 349 U.S. 155, 160–161; *McCarthy* v. *Arndstein,* 266 U.S. 34, 40. Therefore, unless Congress conferred upon Welden an "immunity from prosecution coextensive with the constitutional privilege" (*Brown* v. *United States,* 359 U.S. 41, 46; *Ullmann* v. *United States,* 350 U.S. 422; *Brown* v. *Walker,* 161 U.S. 591), he was free to rely upon his Fifth Amendment privilege, and to refuse before the subcommittee to give self-incriminatory testimony. See *e.g., McCarthy* v. *Arndstein,* 266 U.S. 34, 42; *Counselman* v. *Hitchcock,* 142 U.S. 547. It is our contention that Congress has not granted an immunity from prosecution as to mat-

[5] The district court did not pass on appellee's alternative contention that he had obtained immunity as a result of testimony given in a Federal Trade Commission proceeding, although it was specifically requested to do so by the government (R. 43–44).

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ters about which a witness testifies before a congressional committee investigating violations of the antitrust laws. The statute upon which appellee relies in claiming that he was granted such an immunity, the Act of February 25, 1903, applies only to testimony given in certain judicial proceedings.

One of the crucial issues litigated and decided in 1906 in *Hale* v. *Henkel,* 201 U.S. 43, was whether the phrase "proceeding, suit or prosecution" in the antitrust immunity provision enacted in 1903 and now found in 15 U.S.C. 32 was even broad enough to cover all forms of judicial inquiry, including a grand jury proceeding. The Court concluded that (201 U.S. 66):

> While there may be some doubt whether the examination of witnesses before a grand jury is a suit or prosecution, we have no doubt that it is a "proceeding" within the meaning of this proviso. The word should receive as wide a construction as is necessary to protect the witness in his disclosures, *whenever such disclosures are made in pursuance of a judicial inquiry,* whether such inquiry be instituted by a grand jury, or upon the trial of an indictment found by them. [Emphasis added.]

In the present case the district court has held that the scope of 15 U.S.C. 32 is not limited to "disclosures * * * made in pursuance of a judicial inquiry." Although no committee of Congress has, so far as we know, ever asserted the right to compel incriminating testimony by any witness testifying in an investigation of violations of the antitrust laws, the court below has held that the 1903 statute renders any witness before a congressional committee

investigating antitrust violations immune from prosecution for any matter about which he may testify. The witness would thus be denied his right to decline to give otherwise incriminating testimony in reliance upon his Fifth Amendment privilege. This expansion of the scope of 15 U.S.C. 32 is inconsistent with the intent plainly manifested by the words of the statute and disregards a long history of unwillingness by Congress to grant its committees the very powers the district court has found implied in 15 U.S.C. 32.

The plain language of the Act of February 25, 1903 (15 U.S.C. 32) establishes that its scope is limited to judicial proceedings. After referring to the Interstate Commerce Act, the Sherman Act, and part of the Wilson Tariff Act, Congress appropriated $500,000 "to be expended under the direction of the Attorney General * * * to conduct proceedings, suits, and prosecutions under said Acts in the courts of the United States." In the succeeding clause the Act provides "that no person shall be prosecuted * * * for * * * any * * * matter * * * concerning which he may testify * * * in any proceeding, suit, or prosecution under said Acts * * *."

Congressional hearings are conducted under the Legislative Reorganization Act of 1946, 60 Stat. 812, rules and regulations adopted by either House, or, as in the instant case, under a special resolution (see note 4, *supra,* p. 4); they have never been considered proceedings "under" such statutes as the Sherman Act. Moreover, the dual reference to proceedings, suits, and prosecutions was meant as an all-inclusive description of those judicial proceedings "in the courts of the United States" which were authorized by the

named statutes. The phrase "proceeding, suit, or prosecution" in the immunity proviso was intended to have the same meaning as the phrase "proceedings, suits, and prosecutions" in the appropriation clause, where the context makes a limitation to judicial proceedings unmistakable. This identity of meaning is confirmed by the very limited legislative history which indicates that Congress intended to give the Attorney General two forms of assistance—a special appropriation and a power to compel incriminatory testimony—to help him conduct the same type of proceedings, suits, and prosecutions under the same statutes.

The plain meaning of the language of the statute is confirmed by the uniform assumption of the courts, the Congress, and the commentators that no immunity provision existed for congressional hearings from 1862 to 1954. This assumption is rooted in a history of extreme reluctance by Congress to grant an immunization power to its committees. In light of this long and clear history Congress cannot be thought to have intended the Act of February 25, 1903, to grant a sweeping and almost unrestricted power of immunization upon its committees when there is not a single suggestion of any such purpose in the legislative history and when the language of the statute so strongly indicates a contrary intent.

A. *The language of the immunity provision plainly indicates that the provision was never intended to apply to testimony given before congressional committees.*

The antitrust immunity provision, now codified as 15 U.S.C. 32, was enacted as part of the general ap-

propriations Act of February 25, 1903, which provided in pertinent part as follows:

> That for the enforcement of the provisions of the [Interstate Commerce] Act * * *, * * * the [Sherman] Act * * * and * * * [the anti-trust provisions of the Wilson Tariff] Act, * * * the sum of five hundred thousand dollars * * * is hereby appropriated, * * * to be expended under the direction of the Attorney General * * * to conduct proceedings, suits, and prosecutions under said Acts in the courts of the United States: *Provided,* That no person shall be prosecuted * * * for * * * any * * * matter * * * concerning which he may testify * * * in any proceeding, suit or prosecution under said Acts * * *.[*]

The inapplicability of the 1903 Act to hearings before congressional committees is plain from the language of the statute. The immunity results only from testimony "in any proceeding, suit, or prosecution *under said Acts* * * *" (emphasis added). Hearings of congressional committees are conducted under the Legislative Reorganization Act of 1946, 60 Stat. 812, rules and regulations adopted by either House, or, as in the instant case, under a special resolution (see Note 4, *supra,* p. 4). See *United States* v. *Rumely,* 345 U.S. 41; *Wilkinson* v. *United States,* 365 U.S. 399, 407–409; *United States* v. *Seeger,* 303

[*] The codification of the Act of 1903 at 15 U.S.C. 32 has never been enacted into positive law. It differs from the wording of the original act only in eliminating the appropriation provision of the 1903 statute, thereby making it necessary to refer to the Sherman, Interstate Commerce, and Wilson Tariff Acts by section number rather than merely by reference back to "said Acts."

F. 2d 478, 482–483 (C.A. 2). They have never been considered by Congress to be proceedings "under" the antitrust laws or the Interstate Commerce Act.

This interpretation of the phrase "proceeding, suit or prosecution under said Acts" is confirmed by the meaning of the immediately preceding, virtually identical phrase "proceedings, suits, and prosecutions under said Acts" in the very same sentence of the same statute. In the 1903 Act Congress provided a special appropriation of $500,000 for the enforcement of the Sherman, Interstate Commerce, and Wilson Tariff Acts, "to be expended under the direction of the Attorney General * * * to conduct proceedings, suits, and prosecutions under said Acts in the courts of the United States." In the very next clause Congress then provided immunity for any matter concerning which a person might testify in the type of proceedings for which it had just appropriated $500,000—*i.e.*, "in any proceeding, suit, or prosecution under said Acts * * *." Unless the same phrase was intended to have different meanings in two successive clauses of the same Act, the immunity provision, like the appropriations provision, applied only to proceedings, suits, or prosecutions brought "in the courts of the United States."[7] Congress did not

[7] For the same reason, we submit that the only proceedings, suits, or prosecutions within the scope of the immunity provision are those brought "under the direction of the Attorney General." This would, of course, include grand jury proceedings, at least when brought and conducted "under the direction of the Attorney General." See *Hale* v. *Henkel*, 201 U.S. 43, 46. However, there may be situations in which a witness retains his Fifth Amendment privilege and immunity is not available even in

repeat the phrase "in the courts of the United States" in stating the immunity provision because the statute obviously refers to the same "proceedings, suits, and prosecutions" in the two adjoining clauses of the same sentence. In sum, Congress used the words "proceeding," "suit," and "prosecution," both in the singular and the plural, as an all-inclusive description of those proceedings "in the courts of the United States" which were authorized "under [the] Acts" for the enforcement of which $500,000 was appropriated.[8] It is only for testimony in these judicial "proceedings, suits, and prosecutions" conducted "in the courts of the United States" that the 1903 statute grants an immunity. See *Hale* v. *Henkel,* 201 U.S. 43, 66, *supra,* p. 6.

That the immunity was intended only for testimony given in those proceedings "in the courts of the United States" for which the appropriation was made is confirmed by legislative history showing that Con-

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proceedings brought by the Attorney General. See *United States* v. *Standard Sanitary Mfg. Co.*, 187 Fed. 232 (E.D. Pa.).

[8] The "Acts" to which the immunity proviso refers are the Interstate Commerce Act, the Sherman Act, and the antitrust provisions of the Wilson Tariff Act. These statutes authorize a variety of judicial proceedings to enforce the several remedies for which they provide, including (1) criminal prosecutions and grand jury proceedings for violations (Sherman Act, §§ 1 and 2; Wilson Tariff Act, § 73; § 10 of the Interstate Commerce Act, as amended by the Act of March 2, 1889, 25 Stat. 857; Elkins Act, § 1, 32 Stat. 847); (2) suits in equity to enjoin violations (Sherman Act, § 4; Wilson Tariff Act, § 74; § 16 of the Interstate Commerce Act, as amended by 25 Stat. 859; Elkins Act, § 3); and (3) forfeiture proceedings (Sherman Act, § 6; Wilson Tariff Act, § 76).

gress in the 1903 Act intended to provide the Attorney General with dual enforcement weapons: (1) a special, additional appropriation, and (2) the power to compel incriminating testimony. Congressman Hepburn, who had introduced a bill providing immunity in proceedings under the antitrust laws (H.R. 15383, 57th Cong., 2d Sess.; 36 Cong. Rec. 5), sponsored an amendment to the appropriations bill covering the Department of Justice which contained both a special appropriation and an immunity provision. He explained that his amendment was preferable to another proposed amendment providing only for a special appropriation (36 Cong. Rec. 411) because his proposal "gives an added probability of conviction, for without the language here used we might have difficulty in the way of prosecutions" (*id.* at 412). One difficulty he mentions is that the public prosecutor does not "have the means of marshaling and procuring testimony" (*ibid.*). His substitute would, in his view, enable the Attorney General "to secure the very best of legal talent, and then reenforce * * * [them] by placing at their disposal the means of securing the necessary proof" (*ibid.*).

These statements by the sponsor of the amendment which, so far as we are aware, are the only relevant contemporaneous statements, confirm what the wording of the immunity provision, when read alone or in context, makes clear—that immunity was intended to be conferred only for testimony given in the type of proceedings for which Congress was granting a special appropriation, *i.e.*, for testimony in judicial proceedings conducted "in the courts of the United States" under the named statutes. There

is no indication in the legislative history that the immunity provision was ever intended to be applicable to a hearing before a Congressional committee.[9]

B. The inapplicability of the immunity provision of the 1903 Act to congressional hearings is confirmed by the traditional unwillingness of Congress to confer a power to grant immunity upon its committees and by the assumption of courts, Congress, and commentators that no such power existed between 1862 and 1954.

1. This interpretation of the 1903 Act, which we submit is compelled by its language, is alone consistent with the uniform assumption of the courts, the Congress, and the commentators that from 1862 to 1954 no committee of Congress had power to grant immunity from prosecution and therefore that none could compel a witness before it to testify over his objection on grounds of self-incrimination. *Bart* v. *United States*, 203 F. 2d 45, 48 (C.A.D.C.), reversed on other grounds, 349 U.S. 219; *Carlson* v. *United States*, 209 F. 2d 209, 212 (C.A. 1); H. Rep. 2606, 83d Cong., 2d Sess., pp. 5–7; *id.*, pp. 11–12 (minority views); S. Rep. 153, 83d Cong., 1st Sess., p. 2; Dixon, *The Doctrine of Separation of Powers and Federal Immunity Statutes*, 23 Geo. Wash. L. Rev. 501, 503–509 (1955); Dixon, *The Fifth Amendment and Federal Immunity Statutes*, 22 Geo. Wash. L. Rev. 447, 466–467 (1953–54); Brown, *Immunity for Witnesses in Congressional Hearings*, 1 U.C.L.A. L. Rev. 183, 186–190 (1953–54); Boudin, *The Immunity Bill*, 42 Geo. L. J. 497; 507–510 (1953–54); Liacos,

[9] There was no discussion of the immunity provision in the Senate (36 Cong. Rec. 989–990).

Rights of Witnesses before Congressional Committees, 33 B.U. L. Rev. 337, 378 (1953); Note, *Self-incrimination and Federal Anti-Communist Measures*, 51 Col. L. Rev. 206, 213 (1951); and Note, *Applicability of Privilege Against Self-incrimination to Legislative Investigations*, 49 Col. L. Rev. 87, 94–96 (1949). Indeed, other than the decision below, we are not aware of a single case which has held the immunity provision in any of the many regulatory statutes enacted during this period (see Appendix *infra*, p. 22) to be applicable to a hearing before a congressional committee. See Note, *The Federal Witness Immunity Acts*, 72 Yale L. J. 1568, 1595, n. 122.[10]

This uniform assumption is rooted in a history which shows extreme reluctance by Congress to grant immunity for testimony at congressional hearings. The earliest immunity statute was the Act of January 24, 1857, 11 Stat. 155, which related explicitly and exclusively to testimony before either House of Congress and

[10] In the court below appellee relied upon an oral opinion of a district court in *United States* v. *Armour & Co.*, 142 Fed. 808 (N.D. Ill.), a case also cited by the court below (R. 40). This opinion was almost entirely devoted to consideration of the scope of a wholly separate immunity provision in a 1903 statute creating a Commissioner of Corporations. § 6, Act of February 14, 1903, 32 Stat. 827–828. It neither involves nor considers the applicability of the immunity provisions of the Act of February 25, 1903, the statute here involved, to investigations before a congressional committee although, in dictum (at 826), the district court did state—we believe erroneously—that these antitrust immunity provisions would apply to a proceeding before the Commissioner of Corporations.

their committees—not to court proceedings."[11] Section 2 provided in part that:

> * * * no person examined and testifying before either House of Congress, or any committee of either House, shall be held to answer criminally in any court of justice, or subject to any penalty or forfeiture for any fact or act touching which he shall be required to testify before either House of Congress or any committee of either House * * *.

Experience under this broad immunity provision soon led Congress to amend it. Because of testimony before congressional committees, indictments were quashed in two highly publicized cases, in circumstances where the propriety or need for the testimony was questioned.[12] Congress reacted by passing the Act of January 24, 1862, 12 Stat. 333, which amended Section 2 so as to protect the witness only from use of the testimony against him, not from prosecution.

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[11] The event which led to the enactment of the 1857 statute was a strongly-worded editorial in the New York Times charging that members of the House of Representatives had sold or offered to sell their votes on pending measures (Cong. Globe, 34th Cong., 3d Sess., p. 274). A House committee appointed by the Speaker to investigate, reported that a correspondent of the Times, after stating that members of Congress had offered to sell their votes through him, refused to disclose their names (*id.*, at 403–404). One purpose in passing the statute was "to remove the obstacle to the investigation of parliamentary corruption * * *" (*id.*, at 427). See Eberling, *Congressional Investigations* (1928), pp. 150–154, 302–316.

[12] One case involved a former Secretary of War, and the other, a government employee who "purloined two millions in bonds from the Interior Department * * *." Cong. Globe, 37th Cong., 2d Sess., 428; *id.*, 57, 228, 364.

See, Eberlihg, *Congressional Investigations* (1928), pp. 150–154, 302–316, 320–324.

In 1876, another incident prompted efforts to restore the broader immunity provisions of the 1857 Act. In connection with contemplated impeachment proceedings against Secretary of War Belknap, the House Committee on the Judiciary wished to make certain that the testimony of the chief witness in support of the charges would be made available (4 Cong. Rec. 1564–1572). Accordingly, it recommended the passage of a bill (H.R. 2572, 44th Cong., 1st Sess.), which was in substance a re-enactment of Section 2 of the 1857 Act. See 4 Cong. Rec. 1564. The bill passed the House (4 Cong. Rec. 1571), but died in the Senate. The lengthy adverse report of the Senate Committee on the Judiciary (S. Rep. 253, 44th Cong., 1st Sess.) emphasized that to give the immunization power to committees of Congress would open the door to many abuses and would more often hurt than help the cause of justice (*id.*, at pp. 1, 7). The report recalled the experience under Section 2 of the 1857 Act (*id.*, at pp. 8–10), which "had come to be a crying and notorious evil" and "was repealed by the unanimous vote of both houses of Congress" (*id.*, at 9). See, Eberling, *supra*, pp. 336–339.

In light of this history of Congress' extreme concern for the possibilities of abuse of an immunity power by congressional committees, it is fair to conclude that, had Congress intended in some later statute to empower its committees to grant immunity from prosecution, it would have done so explicitly as it

did in 1857 and its intent would have been manifest in the legislative history. Yet between 1862 and 1954 Congress enacted no immunity legislation applicable in its terms to hearings before its committees.[13] More particularly, it is extremely unlikely that Congress intended to depart from its traditional reluctance to grant an immunization power to its committees with a statute such as the 1903 Act, the language and legislative history of which fail to reveal even the slightest indication that the Act might be applied to testimony before a congressional committee.

This conclusion is underscored by the nature of Congress' action in 1954 when it enacted, for the first time since 1862, a statute which, by its terms, confers immunity for certain testimony given before a congressional committee. In the Immunity Act of 1954, 68 Stat. 745 (18 U.S.C. 3486), after full debate,[14] Congress explicitly provided for immunity for testimony given before a congressional committee, but only under carefully circumscribed conditions. The statute provides that, in an investigation concerning

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[13] A brief history of immunity legislation enacted between 1862 and 1954 but not conferring immunity for congressional hearings is set forth in the Appendix, *infra* pp. 22–23.

[14] In connection with the passage of the 1954 Act, the attention of Congress was again invited to the possibility of abuse of the immunization power, experience under the 1857 Act was recalled, and reference was made to the adverse Senate report on the 1876 proposal to broaden the immunity powers of congressional committees. It was taken for granted that no immunity provision had existed since 1862 for testimony at a congressional hearing. H. Rep. 2606, 83d Cong., 2d Sess., pp. 5–7, 7–8; *id.*, Minority Report, pp. 11–14; S. Rep. 153, 83d Cong., 1st Sess.; *id.*, Part 2.

national defense or security, no witness shall be excused from testifying or producing evidence "before either House, or before any committee of either House, or before any joint committee of the two Houses of Congress" under a claim of self-incrimination and the witness shall be granted a corresponding immunity, but only if: (a) the witness has claimed his privilege against self-incrimination, (b) a two-thirds vote of the full committee has affimatively authorized the grant of immunity, (c) an order of a federal district court has been entered in the record requiring the witness to give evidence, and (d) the Attorney General has been notified of the proposed grant of immunity and has been given an opportunity to be heard in the district court with respect to each application for an order to compel testimony.

To recapitulate: (1) The experience of Congress under the broad immunity provision of the 1857 Act had been so unsatisfactory that Congress repealed it five years later and refused to reinstate it in 1876; (2) between 1862 and 1954, it was generally accepted that no congressional committee could grant immunity; and (3) when Congress in 1954 again did provide an immunity for proceedings before congressional committees, it did so only after the most careful consideration, explicitly referred to such committees, and imposed detailed restrictions upon the grant. In these circumstances, it would run counter to a century of congressional history to read the grant of immunity in the 1903 Act for testimony given "in any proceeding, suit or prosecution under [the anti-trust] Acts," as covering testimony before a congressional committee.

2. There are sound policy considerations why the immunity provisions of the 1903 Act should not by implication be construed to apply to congressional proceedings. The hearings of a great number and variety of congressional committees and subcommittees frequently involve questions bearing upon the subject matters regulated by the Sherman, the Interstate Commerce, and the Wilson Tariff Acts. Under the district court's decision, a hearing touching on any of these laws would be a "proceeding" covered by the immunity provision. Thus, the intent attributed to Congress by the district court would be to empower many committees or subcommittees to compel incriminatory testimony and to confer a broad immunity from all criminal prosecution with respect to any matter concerning which testimony is given, including prosecution with respect to matters touching on national security or defense. And such immunity could be conferred without alerting the committee (for the privilege need not be claimed), without a vote by the committee, without a court order, without notification of the Attorney General, without, in short, any of the procedural safeguards which Congress has provided in the case of committees investigating national security and defense. All this could be done, under the district court's decision, merely by the taking of testimony pursuant to a subpoena.

The decision below thus poses the following dilemma: (1) If congressional committees continue their present practice of summoning and questioning all witnesses whose testimony they deem pertinent,

and who have not asserted a claim that their testimony would be self-incriminatory, the result will be a widespread grant of immunity from criminal prosecution, (2) if congressional committees, because of their concern over possible immunity resulting from a witness's appearance, severely limit the scope of their questioning, the effectiveness of congressional investigations as an important element of the legislative process would be seriously impaired. Either of these consequences would be damaging to the public interest. Certainly, such a construction should be avoided unless compelled. Here, as we have argued, the statutory language and history demonstrate that it is the contrary construction which is compelling.[15]

[15] The district court's observation (R. 40) that it would contravene "traditional American notions of fair play" to require "a defendant to stand trial for conduct about which he has been compelled to testify by the subpoena power of a Congressional Subcommittee" is far wide of the mark. The district court failed to recognize the basic distinction between the power of Congress to compel testimony generally and to compel incriminating testimony. A witness summoned to testify can fully protect himself against giving incriminating testimony—and it is only the compulsory production of such testimony that might be unfair—by claiming his privilege. Appellee could not have been compelled by the subcommittee to give incriminating testimony.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.[16]

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ROBERT B. HUMMEL,
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Attorneys.

DECEMBER 1963.

[16] In place of the Solicitor General, who has disqualified himself for personal reasons.

APPENDIX

The following is a brief history of immunity legislation enacted between 1862 and 1954:

In 1868, Congress passed the first immunity statute relating to judicial proceedings. Act of February 25, 1868, 15 Stat. 37. This Act, like the amended 1857 Act dealing with congressional hearings, did not grant immunity from prosecution, but provided that evidence obtained from a party or witness could not subsequently be used against him in a criminal proceeding. The original Interstate Commerce Act of 1887 (24 Stat. 379, 383), which contained an immunity provision in the same form, related only to proceedings before the Interstate Commerce Commission. Following this Court's holding in *Counselman* v. *Hitchcock,* 142 U.S. 547, that such form of immunity was inadequate to compel incriminatory testimony because the witness was still subject to prosecution, Congress passed the Compulsory Testimony Act of February 11, 1893, 27 Stat. 443 (49 U.S.C. 46). That Act granted immunity from prosecution, but related only to proceedings under the Interstate Commerce Act.

In February 1903, similar immunity provisions were included in three additional statutes, one of which is the statute containing the provision here involved. The others were: (1) the Act of February 14, 1903, 32 Stat. 825, 827, which established the Department of Commerce and Labor, gave the Commissioner of Corporations the same investigatory powers as the Interstate Commerce Commission, and specifically incorporated by reference the immunity provisions

of the 1893 Act; and (2) the Elkins amendment to the Interstate Commerce Act, adopted February 19, 1903, 32 Stat. 847, 848, in which the immunity provisions were also restated verbatim.

Thereafter, as the scope of federal regulation expanded, Congress routinely included in almost every major regulatory statute an immunity provision relating to proceedings under that statute. See *United States* v. *Monia*, 317 U.S. 424, 434–435, 442–443 (dissenting opinion); Lilienthal, *The Power of Governmental Agencies to Compel Testimony*, 39 Harv. L. Rev. 694, 697–698 (1925–1926); Note, *The Federal Witness Immunity Acts*, 72 Yale L. J. 1568, 1571–1576 (1963).

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